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In the Supreme Court of the United States

October Term 1957

COWLITZ TRIBE OF INDIANS,
Petitioner,

vs.

THE CITY OF TACOMA, a Municipal Corporation,
Respondent.

No. 720

PETITION FOR REHEARING ON PETITION FOR CERTIORARI

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UNIVERSITY PRINTING CO.

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CONTENTS

Page

Petition for Rehearing on Petition for Certiorari 1

INDEX TO PETITION

Reference to Opinion of Court of Appeals, Ninth Circuit 2

Reason Petition for Rehearing Should Be Granted 2

Respondent's Defense 3

Reason Court of Appeals in Error 3

Argument of Petitioner 5

Two Similar Cases 6

Respondent Bound by Disclaimer 8

Certificate 9

CASES CITED

Beecher v. Wetherby, 95 U.S. 517 ..... 3, 6, 7

Chehalis v. U.S.A., 155 Fed. Supp. 226 4

Duwamish Tribe of Indians v. United States, 79 Ct. Cls. 530, *Cert. Den.* 295 U.S. 755 4

Johnson v. McIntosh, 8 Wheaton 543 3

Mitchell v. United States, 9 Peters 711 ..... 5, 6

Muckleshoot v. U.S.A., 2 Ind Cl. Com. 424 4

Soulard v. United States, 4 Peters 511 6

Tee-Hit-Ton v. United States, 384 U.S. 272 5

U.S. v. Santa Fe and Pacific R. Co., 314 U.S. 339 ..... 3, 7

CONSTITUTIONS

Constitution of the United States, Amendment XIV 2

Washington State Constitution, Article XXVI 8

STATUTES

9 Stat. 323 9
13 Stat. 365 2
16 Stat. 378 2
30 Stat. 597 2
34 Stat. 197 2
Enabling Act, Washington Territory 2

MISCELLANEOUS

Opinions of U.S. Attorney General, 22 June 1885.... 9

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Now comes the petitioner, by its counsel, and prays for a rehearing.

An action was brought by your petitioner, the Cowlitz Tribe of Indians, for an injunction against the City of Tacoma, to enjoin the latter from constructing two dams on the Cowlitz River. The essential basis of the claim of your petitioner is that it is in actual occupation of certain lands and waters from time immemorial (which the respondent admits by its failure

to traverse) which occupation will be destroyed if the respondent is allowed to construct the said dams; that this dispossession by respondent is without due process of law; and in violation of the Fourteenth Amendment to the Constitution of the United States; and that the title of your petitioner is "original Indian title" and comes under the protection of the said Fourteenth Amendment.

The respondent says that it is the successor to the special grants by Congress to the Northern Pacific Railroad Company under four Acts (13 Stat. 365, 16 Stat. 378, 30 Stat. 597 and 34 Stat. 197), and that your petitioner stands in the shoes of the United States and is immune from legal action, hence the constitutional courts of the United States are without jurisdiction.

The Court of Appeals, Ninth Circuit, in a restatement of its opinion, said,

> "The decisive point is that the District Court has no jurisdiction of the alleged cause."

Petition for a writ of certiorari was denied by this court.

This petition for a rehearing should be granted because:

(1) the property rights of many thousands of non-treaty Indians are based on their present and actual

occupation of lands which began from time immemorial to the present day, a title commonly known as "original Indian title";

(2) that to refuse to grant this petition will, in effect be, to reverse the opinions of this court beginning with *Johnson vs. McIntosh*, 8 Wheaton 543; *Beecher v. Wetherby*, 95 U.S. 517, and subsequent cases where the parties asserting a paramount right to dispossess non-treaty Indians did not include the United States.

The respondent's defense is the following:

(1) "any rights the petitioner may have had have been extinguished by Congress by the issuance of patents, conveyances and grants" such as to the Northern Pacific Railroad Company, and so (2) the petitioner's "only recourse is the prosecution of its claim * * * against the government under the Indian Claims Act;" and finally, since the issues relate "solely (to) the title and rights to land located wholly within" the State of Washington, "the courts of the State of Washington have exclusive and original jurisdiction." (This decision is contrary to this Court's holding in *U.S. v. Sante Fe and Pacific Railroad* (314 U.S. at page 354.)

The Court of Appeals seems to have denied jurisdiction because of at least two flagrant errors, one of fact and the other of law. It held:

(1) that there was no allegation that the values in-

volved exceeded the jurisdictional sum of $3,000. In its own summation of the complaint, the Court said "more than the jurisdictional amount is involved" while narrating two paragraphs later it said that "neither diversity of citizenship NOR a jurisdictional amount has been alleged," overlooking paragraph IV of the complaint as well as the Court's own summation.

(2) the Court gave probative force amounting to *res adjudicata* to the answer of the United States filed by the petitioner in a totally different court, which answer included the following:

> "the Tribe has no rights therein and the claim should be denied under the *Duwamish Tribe of Indians vs. United States*, 79 Ct. Cls. 530, cert. den., 295 U.S. 755." (This case has been overruled by the Court of Claims and Indian Claims Commission in *Chehalis vs. U.S.A.*, 155 Fed. Supp. 226, at page 228, *Muckleshoot vs. U.S.A.*, 2 Ind. Cl. Com. 424.)

following which words, the Court of Appeals said:

> "it is thus clear that the question is political and not justiciable."

It would be astonishing doctrine if any court could support its opinion by citing an allegation of either a plaintiff or a defendant from the pleadings in a case yet pending in some other court. Counsel requests this court take notice of it.

The court below said in its opinion, "The primary question in a condemnation action is compensation

for the title." This your petitioner will not deny. But this is not a condemnation case. Your petitioner does not wish to lose its property without due process of law, and so denies the right of respondent to destroy the property of your petitioner even for a public purpose under a claim that petitioner has no recourse either against the United States or respondent since it claims to have procured the immunity of the United States through its grantees.

THE ARGUMENT OF PETITIONER

Land occupied by non-treaty Indians under "original Indian title" is property, and the citation used by respondent taken from the *Tee-Hit-Ton v. United States* case (384 U.S. 272), which is a 5th Amendment case, to-wit:

> "This (actual occupancy) is not a property right, but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties"

must be read in the light of all the many pronouncements of this court on this question. For one thing, the respondent is a third party, and cannot avail itself of defenses available to the United States against a claim based on the 5th Amendment because your petitioner's claim is based on the 14th Amendment against a taking without due process of law.

In the *Mitchell v. United States* case (9 Pet. 711,

746) this court said:

> "Indian * * * hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way * * * as much respected."
>
> "That by the law of nations, the inhabitants * * * retain all the rights of property which have not been taken from them by the orders of the conqueror." (Mitchell case *supra*)

In the case of *Soulard v. United States*, 4 Pet. 511, 512-513, this court defined the word "property" thus:

> "The term 'property' as applied to lands comprehends every species of title inchoate or complete. It is supposed to embrace those rights which lie in contract; those which are executory as well as those which are executed. In this respect the relation of the inhabitants (of the Territory of Louisiana under the treaty of purchase) is not changed."

and so, petitioner holds that "the Indians were considered as owning (the lands they occupied) as their common property." *Mitchell v. United States, supra.*

TWO SIMILAR CASES

In *Beecher v. Wetherby*, 95 U.S. 517, a tract of land which the United States had expressly permitted the Indians to occupy was later expressly conveyed by the United States to the State of Wisconsin, after which, a dispute arose as to the right of Wisconsin

to convey timber land occupied by the Indians. This court said:

> "the Grantee (Wisconsin) * * * would take only the naked fee, and could not disturb the occupancy of the Indians; that the occupancy could only be interfered with or determined by the United States."

The *Wetherby* case is like the current one in this, (1) the occupation by the Indians was by permission of the United States; (2) the fee to the land was in the non-Indians who sought to dispossess the Indians whose only title was "original Indian title," *i.e.* actual occupation. The court held that subject to the right of occupancy by the Indians, the fee was in Wisconsin. And so it would be with Northern Pacific Railroad Company, and when it conveyed its rights to respondent, it would convey only what it had, to-wit: the naked fee. The language of the *Hualapai* case describes extinguishment of Indian title as follows:

> "This court has consistently held that, in the absence of express language to the contrary, a Federal grant of public land does not constitute an extinguishment of Indian occupancy right." 314 U.S. 339.

In the Hualapai Indian case (*U.S. v. Sante Fe and Pacific Railroad*, 314 U.S. 339) the United States expressly conveyed the land in question to the Railroad Company. In an identical statute, the United

States conveyed the land in litigation to the Northern Pacific Railroad Co., who in turn conveyed its rights to the respondent. (1) In both cases, the title rests on an identical act of Congress; both titles were of many years standing; in both cases the original grantee had conveyed its rights to the defendants in each case; in both cases, the title of the Indians was merely "original Indian title" *i.e.*, actual occupation; the Hualapai Indians prevailed as should the Cowlitz tribe.

The respondent, as an inferior appendage of the State of Washington, is bound by the disclaimer exacted from Washington Territory in the Enabling Act; Clause 25 Statutes, C180, p. 676, Section 4 Ss 2:

> "That the people inhabiting said proposed State do agree and declare that they *forever disclaim all right and title* to. . . *all lands lying within said limits owned or held by any Indian* or Indian Tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian Lands shall remain under the absolute jurisdiction and control of the Congress of the United States . . ." (Emphasis supplied) same as Art. XXVI Wn. State Constitution.

A similar disclaimer was exacted by the Congress of the United States, when the Oregon Territory was created, 9 Statutes 323:

> ". . . nothing in this Act contained shall be construed to impair the rights of person or property

now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by Treaty between the United States and such Indians. . . ." (see Opinion of U. S. Atty. Genl. 22 June 1885).

We submit that the facts and the law cited above entitle your petitioners to a rehearing in order that the basic law of "original Indian title" might not be reversed by negation unless, of course, that is the result this Honorable Court desires.

Respectfully submitted,

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CERTIFICATE

I certify that the foregoing petition is presented in good faith and not for delay.

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